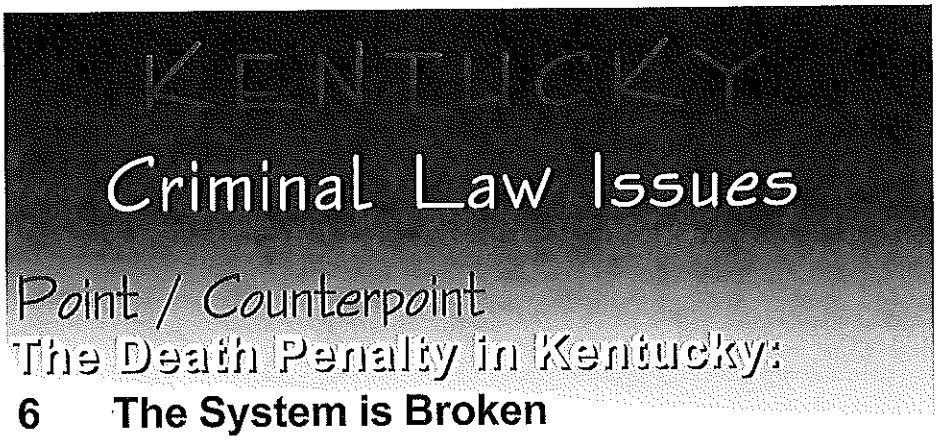
C O N T E N T S

This issue of the Kentucky Bar Association's *Bench & Bar* was published in the month of November.

The *Bench & Bar* (ISSN-1521-6497) is published bi-monthly by the Kentucky Bar Association, 514 W. Main Street, Frankfort, KY 40601-1883. Periodicals Postage paid at Frankfort, KY and additional mailing offices.

Subscription Price: $20 per year. Members subscription is included in annual dues and is not less than 50% of the lowest subscription price paid by subscribers. For more information call 502-564-3795.

POSTMASTER:
Send address changes to:
***Bench & Bar*,**
514 W. Main Street,
Frankfort, KY 40601-1883.



DEPARTMENTS

The Death Penalty in Kentucky: The System is Broken

It is error only, and not truth, that shrinks from inquiry.
Thomas Paine

By Ernie Lewis and Ed Monahan

The system of imposing the death penalty is broken both nationally and in Kentucky. The death penalty no longer effectively serves as sound public policy, and no longer meets the interests of Kentucky citizens in public safety. The passing of a life without parole sentence in 1998 has rendered capital punishment obsolete and arcane, a remnant of a penalty that no longer makes sense. This article looks at Kentucky's state of affairs, national bipartisan analysis, and it offers commonsense recommendations for necessary reforms.

Kentucky Conditions

What evidence is there that the system is broken? Do those same conditions exist in Kentucky? A survey of the national landscape reveals the following:

1) **An unacceptable error rate exists nationally and in Kentucky.** Nationally, 68% of the capital convictions have been reversed due to significant constitutional and procedural violations calling into doubt the fairness of the trial that resulted in the individual's being placed on death row.[1] Kentucky's error rate is comparable to the national error rate.[2] These error rates are phenomenal. They are an indictment of the system of selecting, prosecuting and sentencing persons to death. If any company had such error rate, it would be broke, bankrupt, and out of business. A 7 out of 10 error rate is exceptionally wasteful of limited taxpayers' money and the resources of courts, prosecutors and defense.

2) **There is inadequate funding of Kentucky criminal justice system.** The criminal justice system does not provide sufficient funds to handle complex cases, particularly those cases involving the death penalty. As a result, Kentucky citizens cannot rely upon the accuracy of the outcomes of capital trials. In Kentucky, the entire criminal justice portion of the budgeted funding is but $976 million or 5.39% of the budgeted funds for all 3 branches of state government. Of that $976 million, Corrections is allotted 34%. The

continued on page 8

Judiciary has 23%. Prosecutors receive 7.4%. Public defense brings up the rear at 3%, far less than the funding for prosecutors.[3] Yet, public defenders handle 92% of the same cases in circuit court as do prosecutors.[4] This funding disparity is one of the reasons why the reversal rate remains so unacceptably high.

DNA testing has revealed that what we hoped to be a reliable system of determining guilt and innocence is deeply flawed. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%.

3) **Insufficient resources are provided to Kentucky's public defense.** The most egregious problem is that public defender offices in Kentucky have attorneys whose caseloads average a crushing 484 open cases per lawyer per year.[5] The DPA Capital Trial Branch with its 6 attorney staff cannot handle the defense of all capital cases. Chronic vacancies in the Capital Trial Branch exacerbate the problem. The defender field offices are not staffed adequately to handle capital cases on top of their crushing caseloads. There is only 1 investigator per field office outside of Louisville and Lexington. There are only 3 mitigation specialists in the entire state. In many instances when a defender field office is assigned a capital case it is handled by overworked investigators, no mitigation specialists, and overworked attorneys. This is a recipe for reversal, or worse, for the conviction of an innocent person.

4) **Kentucky's death row manifests the inadequacy.** Many of the persons on Kentucky's death row were represented by a public defender system that historically provided ineffective assistance of counsel due to insufficient resources. Of the 6 capital cases to be resolved by federal court review, only 3 passed constitutional muster.[6] Two cases were reversed for constitutional violations. A third was reversed as a result of the ineffectiveness of trial counsel. The first person to be executed in Kentucky in the post-*Gregg*[7] era was represented by a public defender who was paid $1000 for his representation.[8] Eight persons on death row were represented by attorneys who were later suspended or disbarred by the KBA, convicted of a crime, or are currently under indictment.[9] A person presently on death row was represented by an unpaid volunteer attorney who was solicited by the judge when no other defenders would agree to take the case. His phone number was a local bar, he had a drinking problem, he presented no mitigation phase testimony, and was not present during the direct of the medical examiner yet then conducted the cross-examination. This was in a case involving a black defendant who was charged with killing a white victim. The white codefendant received a sentence of life without the possibility of parole for 25 years.[10]

5) **Innocent people are convicted and sentenced to death.** The inadequate funding of indigent defense historically raises the specter that innocent people are on death row, including in Kentucky. There have been 138[11] persons released nationwide since 1976 who were later proven to be innocent. It is fair to say that the situation in Kentucky is no different from the nationwide experience. To the doubters, Larry Osborne is Kentucky's living example.[12]

The public overwhelmingly believes that innocent people are sometimes convicted of murder. The Harris Poll over the last 3 years indicates that 94-95% of those responding think that innocent people are sometimes convicted of murder.[13]

DNA testing has revealed that what we hoped to be a reliable system of determining guilt and innocence is deeply flawed. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%. In Kentucky that could mean between 650 and 1650 inmates serving time for crimes that they did not commit. Barry Scheck and Peter Neufeld, founders of the *Innocence Project* at Cardoza Law School, in their book, *Actual Innocence* (2001), list the factors they found led to wrongful convictions:

1) Mistaken eyewitness identification;
2) Improper forensic inclusion;
3) Police and prosecutor misconduct;
4) Defective and fraudulent science;
5) Unreliable hair comparison;
6) Bad defense lawyering;
7) False witness testimony;
8) Untruthful informants;
9) False confessions.[14]

Race plays a tragic role in this process. Scheck and Neufeld

reported in *Actual Innocence* that the race of the exonerated defendants was: 30% Caucasian; 11% Latino; and 57% African American.[15] This is on top of the systemic racism that has been found to exist in the capital punishment system in Kentucky and throughout the nation.[16]

We know by recent experience that innocent people have been sent to prison in Kentucky. No Kentuckian wants an innocent person incarcerated. There has been a lot of activity in Kentucky recently that reflects the public's concerns about the wrongly convicted. Kentucky has experienced the uncovering and freeing of the innocent in three documented cases: William Gregory, Larry Osborne, and Herman May.

New DNA tests proved William Gregory of Jefferson County did not commit that crime for which he served 8 years in prison. Gregory was the first Kentuckian and the 74th nationally to be released as a result of exoneration by DNA evidence.[17]

Larry Osborne of Whitley County was acquitted on August 1, 2002 of all charges and set free. He spent over three years on Kentucky's death row. He became the 102nd death row person exonerated since 1973.[18]

Herman May of Franklin County was convicted in October of 1989 of rape and sodomy and sentenced to concurrent 20 year sentences. He was released September 2002 on the results of mitochondrial DNA testing.[19]

6) **Warrant practice is wasteful of limited resources and causes incomplete post-conviction pleadings.** Prosecutors and defenders are wasting significant time on the death warrant practice because of the requesting of warrants prematurely. DPA has had to spend precious resources on many cases since 1997 where premature death warrants were requested, and eventually stayed; cases where any reasonable observer would know that a court would grant a stay. This results in the hurried preparation and filing of post-conviction actions, which has the effect of risking the missing of issues or the filing of claims prior to the complete researching of the issues, and the duplicating of efforts in order to amend hastily filed pleadings. The premature request of death warrants is needless due to the one year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[20]

7) **Limited federal review necessitates high quality state trials.** The passage of the AEDPA has limited severely the reach of the federal court in overseeing the fairness of death penalty verdicts.[21] The standard of review has become quite limited, highlighting the necessity for full and fair review in state post-conviction. Yet, the trend in state post-conviction is away from conducting evidentiary hearings into the adequacy of counsel and the fairness of the trial level proceedings. The care with which death penalty cases have been scrutinized has been severely undermined by the passage of the AEDPA.[22]

8) **Unguided prosecutorial discretion causes inappropriate choices.** Prosecutors' discretion particularly in seeking the death penalty is unguided as opposed to the procedure utilized in the federal system. This can result in the arbitrary use of the death penalty in cases where mitigation is overwhelming, or worse where the race of the defendant or victim plays a part in the charging decision.

continued

9) **The public's views on death penalty.** The public no longer supports the death penalty when life without parole is available as a sentence. The myth that there is widespread and deep support for the death penalty is belied by the facts. While the death penalty continues to maintain significant support among Americans in the abstract when no other sentencing options are presented, polls have shown that the majority does not support the death penalty when other penalty options are present such as life without parole, now a penalty option in Kentucky.[23]

10) **Kentuckians support a bill to eliminate the death penalty for 16 and 17 year olds by a 2 to 1 margin.** A significant majority of Kentuckians favor a bill in the General Assembly that would eliminate the death as a sentencing option for 16 and 17 year olds. On the recent University of Kentucky Survey, 63% of the respondents said they favored such a bill. 32% said they opposed such a bill. 5% said they had no opinion/did not know. While 21% strongly opposed such a bill almost twice as many Kentuckians, 37% strongly favor it.[24]

Leading National Bipartisan Analysis Calls for Moratorium and Substantial Reforms

1) **American Bar Association.** In 1997, the nation's leading professional legal organization called for a moratorium[25] on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed. Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency."[26] Kentucky mirrors that national reality. The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. The ABA's call for a suspension of executions focuses on:

1) incompetency of counsel;
2) racial bias;
3) mentally retarded persons;
4) persons under 18 years of age; and,
5) preserving state and federal post-conviction review.[27]

2) **Constitution Project.** In 2001, The Constitution Project issued *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001).[28] The Project's death penalty initiative and its bipartisan, blue ribbon committee issued this major national report. The Report was published after the group conducted a yearlong review of the death penalty in the United States.

The 30-member death penalty initiative was composed of both supporters and opponents of the death penalty. It included former judges, state attorneys general, federal prosecutors, law enforcement officials, governors, mayors, and journalists, as well as current defense attorneys, religious leaders, victims' rights advocates,

Republicans and Democrats, conservatives and liberals. Co-Chairs of this 30-member group were: Charles F. Baird, former Judge, Texas Court of Criminal Appeals; Gerald Kogan, former Chief Justice, Supreme Court of the State of Florida, former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida; Beth A. Wilkinson, Prosecutor, Oklahoma City bombing case. William Sessions FBI Director in the Reagan and Bush administrations was a member.

Their report is a comprehensive consensus on capital punishment reached by an ideologically and politically diverse group with extensive death penalty and criminal justice experience. It emphasizes the importance of competent and adequately compensated defense counsel, prohibiting the execution of juveniles, instructing jurors on residual doubt, fully informative instructions on consideration of mitigating factors by jurors, expanded discovery insuring exculpatory evidence is provided, establishing prosecution protocols on seeking death.[29]

3) **KCJC Study.** In July 2001, the Kentucky Criminal Justice Council Capital committee unanimously recommended and the Council approved a recommendation that a comprehensive statewide study be conducted to address:
   - Delay in implementing the penalty imposed and consideration of reforms in the review process to make it more timely (revision of RCr 11.42 and possible recommendation to Kentucky Supreme Court regarding stay practice);
   - Incorporate balanced and systemic input, including prosecution and defense and victims' families, into any study;
   - Effective assistance of counsel (minimum standards, certification) and training for trial judges;
   - Access to DNA evidence;
   - Evidentiary issues, *e.g.* jailhouse informant testimony identified as a problem in other jurisdictions; uncorroborated eye witness testimony; unrecorded confessions;
   - Resources for prosecution and defense (establishment of special teams, representation/investigation experts);
   - Prosecutor discretion in seeking death penalty; adaptation of federal guidelines or procedures in other states; independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/level of culpability; and
   - Jury selection and jury instruction in death penalty cases; educating potential jurors on trial process and overall operation of criminal justice system; and criminal background checks of jurors in death penalty cases.[30]

The 2002 Kentucky General Assembly declined to fund this study. The Council has not undertaken it otherwise.

4) **A Broken System**. A recent 600 page study of the death penalty nationally *A Broken System, Part II*,[31] provides additional evidence that race may be playing an important and inappropriate role in Kentucky death sentences and may be increasing the amount of reversible error in Kentucky death verdicts. The study examined over 150 potential explanations for error in capital cases based on thousands of items of data about capital reversals over time, across the country, and in each state with capital punishment.

Kentucky's rate of reversal of capital verdicts since 1976 is comparable to the national error rate of 68%.[32] The study provides some troubling information about two possible causes of capital error in Kentucky. The first factor is the low rate of funding for Kentucky courts. The study shows that low spending on courts is associated with direct appeal reversal rates in capital cases. During the 23 year period studied, Kentucky spent less per capita on courts than all but four states in the nation with the death penalty.

The second factor is the homicide risk to members of the white community relative to the risk of homicide to members of the African-American community. The study found that the closer the homicide risk to white residents of a state approaches the risk of homicide to the state's African-American residents, the more likely it is that state and federal courts will find that death sentences imposed are flawed and have to be overturned. Other things being equal, reversal rates are more than twice as high where homicides are most heavily concentrated on whites compared to blacks than where they are the most heavily concentrated on blacks. Kentucky has the 5th worst ranking on this factor in the nation among states that have the death penalty.[33]

continued

The authors view this second factor as troubling because it may reveal the influence of race on the use of the death penalty. There is evidence that heavy use of the death penalty in response to fears about crime is associated with high rates of error in capital verdicts. The authors also found evidence that high rates of homicide victimization among whites relative to blacks are the one source of pressure from a politically influential segment of the population to use the death penalty for reasons other than the seriousness of particular crimes.[34] Since homicide rates are high in Kentucky for whites relative to homicide rates for blacks, this factor is likely to increase the kind of crime fears among whites that can lead to the imposition of death sentences in weak or marginal cases, which in turn can lead to high rates of reversible error. "Because of those fears, citizens put pressure on officials to seek the death penalty more frequently, even if cases are weak. The weaker the case, the more likely it is to be overturned."[35]

The death penalty for juveniles should be eliminated. Indiana recently abolished this penalty by legislation. The Missouri Supreme Court likewise declared the juvenile death penalty to be cruel and unusual punishment.

5) **Ryan Report.** After more persons on death row were found to be innocent than had been executed, Republican Governor of Illinois George Ryan declared a moratorium and appointed a Commission to study the death penalty. The Commission deliberated two years and made 85 recommendations for reform,[36] including:

a) videotaping custodial interrogations,
b) creating an independent forensic lab,
c) reduction of the number of aggravating factors,
d) state committee to review which cases should be prosecuted capital,
e) a rule defining exculpatory evidence,
f) pretrial hearing to determine reliability of in-custody informant testimony,
g) jury instructed on eyewitness identification and informant testimony,
h) improvement of resources for the criminal justice system.

Recommendations for Reform

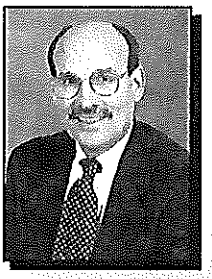
If we are to have a death penalty in Kentucky, it must be altered significantly in order to ensure fairness in administration, accuracy of verdicts, and rationality in outcome. The following reforms are necessary:

- A Moratorium until the system is reviewed.
- Adequate funding of all parts of the criminal justice system, especially indigent defense.
- The independence of the judiciary must be protected.
- The death warrant practice should be streamlined to eliminate the waste of resources by both the Attorney General's Office and DPA. Warrants should not be requested until the 9-step process is concluded or until the defendant has waived further appeals.
- Proof of actual innocence should be allowed whenever the evidence arises prior to the execution. The use of DNA should be encouraged at the trial and post-trial levels in order to ensure that no innocent person is executed or lives a significant period of time on death row.
- The death penalty for juveniles should be eliminated. Indiana recently abolished this penalty by legislation.[37] The Missouri Supreme Court likewise declared the juvenile death penalty to be cruel and unusual punishment.[38]
- The death penalty statute should be redrawn in order to narrow the applicability of the ultimate penalty. There should be no new aggravating circumstances, and there should be a repeal of vague aggravators. In addition, aggravators should be required to substantially outweigh mitigators before death can be imposed.
- The death penalty statute should include additional mitigating circumstances, including that the defendant has a significant history of being sexually, emotionally or physically abused or neglected as a child, that while the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt, that the defendant belongs to a racial minority that has experienced historical racial discrimination, and that the defendant had a difficult, turbulent, or impoverished family history.
- The charging decision by prosecutors should be reviewed by policy makers so that capital prosecutions are implemented consistently and fairly. This should include a procedure for the defense to have the opportunity to present the case for not seeking the death penalty.

- Protocols should be established for the police, the prosecution and courts to use when eyewitnesses, informant, and confession evidence are involved. There should also be a pretrial hearing to determine reliability of in-custody informant testimony and jury instructions cautioning the jury on reliance upon this kind of evidence. All interrogations of the defendant should be videotaped as a matter of practice in order to address the issue of the false confessions.
- There should be a statute or a rule which would require a jury to be instructed that they should not sentence to death unless *all doubt* had been foreclosed, and that would further allow the trial court to lower a death verdict to life in prison in cases in which all doubt had not been foreclosed.
- Kentucky should resist the temptation to create a truncated system of post-trial review, given the large numbers of reversals nationwide and in Kentucky at all levels.
- Jurors should be instructed on the full and individual consideration of mitigating factors.
- Kentucky should create an independent forensic lab separate from the prosecution and law enforcement functions.
- There should be a rule defining exculpatory evidence.

Conclusion

It is time for a change. Capital cases bring out the worst in the criminal justice system. Kentucky does not have the resources or infrastructure that can professionally handle the caseload, emotions, political pressures, or community contagion inherent in a system that includes capital punishment. Our system of capital punishment cannot work without substantial attention, including significant additional resources, paid to it. It is in need of either major reform or abolition. ■



Ernie Lewis has been Public Advocate for Kentucky's state public defender program, the Department of Public Advocacy, since 1996 and a Kentucky public defender since 1977.

Ed Monahan is Deputy Public Advocate and has been a Kentucky public defender since 1976.

Both have represented capital clients at trial, appeal and post-conviction including Eugene Gall, Jr. whose case was reversed by the Sixth Circuit Court of Appeals, *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).

Endnotes

1. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Part I, Error Rates in Capital Cases and What Can Be Done About Them, 1973-1995* (June 12, 2000) at: http://justice.policy.net/cjedfund/dpstudy/. "The 'overall success rate' of capital judgments undergoing judicial inspection, and its converse, the 'overall error-rate,' are crucial factors in assessing the effectiveness of the capital punishment system. The 'overall success rate' is the proportion of capital judgments that underwent, and passed, the three-stage judicial inspection process during the study period. The 'overall error rate' is the reverse: the proportion of fully reviewed capital judgments that were overturned at one of the three stages due to serious error. Nationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%."
2. In Kentucky, since 1976, there have been 83 death sentences. Four persons under the sentence of death have died of natural causes before they exhausted all legal review of their death sentences. Of the 79 remaining, two persons have been executed, 42 have had their death sentences reversed, and 35 are awaiting decisions or are seeking additional review.
3. For Fiscal Year 2004, Kentucky budgeted over $976 million for criminal justice, which is 5.39% of the budget for all three branches of the Commonwealth. The budget for all of state government in FY 04 is over 18.123 billion dollars. The FY 04 criminal justice budget of $976,402,800 is divided as follows:

Corrections	$334,409,700	34.25%
Judiciary	$223,780,000	22.92%
State Police	$134,957,400	13.82%
Juvenile	$116,731,700	11.96%
Prosecution	$72,655,500	7.44%
Criminal Justice Training	$40,641,400	4.16%
DPA	$29,852,200	3.06%
Justice Admin.	$23,374,900	2.39%
Total	$976,402,800	100%

4. Over the last three fiscal years combined, DPA has handled 92.3% of circuit court criminal cases. From FY 01, FY 02, and FY 03 combined, AOC reports 75,792 Circuit Court criminal cases filed including appeals at the Circuit level (Kentucky Administrative Office of the Courts, *Circuit Court - Historical Caseload: FY 1996-2003*, Report # INS017, Run Date: 9/9/2003). In that same time period, DPA opened 69,961 Circuit Court cases (Combined totals from the FY 01, FY 02, and FY 03 DPA *De-*

continued

The Death Penalty in Kentucky: The Punishment Fits the Crime

By David A. Smith

The death penalty plays a vital role in protecting society from the most vicious of murderers. Apart from public protection and the fair punishment of the guilty, it vindicates the rights of victims and their families to see that justice is done. Those whose delay tactics have converted capital punishment into what may sometimes seem like a death row promenade declare the legal system "broken." The only thing ailing the death penalty process is the purposeful obstruction of sentences being carried out. Opponents of capital punishment do not acknowledge the possibility that the death penalty is appropriate in any circumstance, a shortcoming which renders their suggested "improvements" to the system immediately suspect. All too often, the value of a swift and certain death penalty is diluted by the clamor of this vociferous minority of special interest groups who neither know nor care about the crimes committed by these convicted murderers. It is inherently dangerous to base public policy on such a narrow point of view. There is good reason why no politician who wants to be elected or reelected ever openly campaigns as a death penalty abolitionist.

"Life Without Parole" Rarely Means Forever, and It is Far Less Effective than the Death Penalty in Saving Innocent Lives

Death penalty opponents claim that "life without parole" permanently incapacitates a murderer, rendering capital punishment obsolete. Abundant empirical evidence disproves that assertion.

Michael St. Clair was awaiting imposition of his third and fourth sentences of "life without parole" when he escaped from an Oklahoma jail in 1991. Later, in Colorado, he carjacked a 26-year old paramedic who had just purchased groceries for some elderly people living in his home. Handcuffed and begging for his life, the paramedic displayed a photo of his three-year-old adopted daughter and prayed aloud that his captor would show mercy. St. Clair marched him out into the New Mexico desert and executed him with two gunshots. St. Clair later carjacked and handcuffed a man in Kentucky, then executed him. Physical evidence suggested that the victim was on his knees praying when the first shot entered his face.[1]

...continued on page 15

"When the sentence for a crime is not quickly carried out, the hearts of the people are filled with schemes to do wrong."

Ecclesiastes 8:11

Counter: The Punishment Fits the Crime

continued from page 7

Afterwards, during a traffic stop, St. Clair repeatedly shot at a Kentucky State Trooper and escaped again.[2] St. Clair is now on Kentucky's death row.[3]

St. Clair's case is not unique. In 1974, William Thompson was sentenced to unqualified "life" for murder. In 1986 he escaped by murdering a prison guard, for which he was sentenced to death.[4] Other Kentucky death row inmates having a history of at least one prior escape or attempted escape include Donald Johnson,[5] David Skaggs (twice),[6] and Kevin Stanford.[7]

James Blanton, William Hall, and Derrick Quintero were among eight inmates who escaped from the Kentucky State Penitentiary (KSP) on June 16, 1988.[8] After escaping, Blanton, Hall, and Quintero together committed multiple murders in Tennessee and were sentenced to death.[9] In a 1999 federal habeas hearing involving death row inmate Edward Harper, the KSP Warden testified concerning other inmates' recent preparations for yet another escape (stolen prison guard uniforms, hair collected from the barber shop, hoarded food, numerous hacksaw blades, written plans).[10]

Recently, in seven consolidated cases challenging the constitutionality of "life without parole," the Department of Public Advocacy (DPA) filed statistics, compiled by the Department of Corrections, demonstrating that the overwhelming majority of criminals sentenced to "life without parole" are released after serving only a few years.[11] Of the 54 rapists[12] and rapist/murderers sentenced to "life without parole" during a 25 year period, one was killed during an escape, one died of cancer, and 44 (or 85% of the remainder) were released on parole or by commutation.[13] Some were released after serving only six years of their "life without parole" sentences.[14] Others were paroled on as many as five separate occasions each on their "life without parole" sentences.[15] Only eight remain incarcerated.[16] Distinguished jurist and author Bill Cunningham, Lyon Circuit Judge, bluntly observed in his written opinion that "life without parole really hasn't meant 'life without parole.'"[17]

Of the 54 rapists and rapist/murderers sentenced to "life without parole" during a 25 year period, one was killed during an escape, one died of cancer, and 44 (or 85% of the remainder) were released on parole or by commutation. Some were released after serving only six years of their "life without parole" sentences.

Experience confirms what common sense already teaches. The promise of "life without parole" is hollow far too often to render the death penalty obsolete. Only in theory does it permanently incapacitate. In reality it is a calculated risk at best. The lessons of Michael St. Clair (four more innocents murdered after first two sentences), William Thompson (prison guard murdered), James Blanton (two innocents murdered), William Hall (two innocents murdered), and Derrick Quintero (two innocents murdered) are that the death penalty saves innocent lives. Harold McQueen murdered a convenience store clerk who was working nights to pay for her graduate school tuition at Morehead State University.[18] McQueen was executed in 1997. Edward Harper murdered his adoptive parents for profit.[19] He was executed in 1999. It is safe to say that neither McQueen nor Harper can possibly murder another innocent victim. They have been permanently incapacitated by the only certain means available.

The Death Penalty Does Not Cost Innocent Lives

Rather, the Death Penalty Saves Innocent Lives

Death penalty opponents have generated surveys to suggest that "innocent" defendants are being executed at the hand of a hopelessly "broken" legal system. They proclaim that an incredible 68% of all death penalty cases are either seriously flawed with reversible error, or result in the defendants' ultimate "exoneration".[20] These are not disinterested observers. They have a specific agenda. Their concepts of innocence and exoneration discredit their conclusions. Their result-driven methodology does not bear up to scrutiny. Conspicuously absent from their critiques of the death penalty is any mention of the horrific crimes committed by these murderers, or of the permanently ruined families left behind. Instead, their arguments against the death penalty in large part consist of their own statistical analyses. This brings to mind the central character in the 1948 movie *Apartment for Peggy,* who prevailed in every topic she debated by incessantly reciting statistics, until, at last, she admitted making them up. Short of inventing facts, if you torture the numbers long enough they'll confess to anything.

The survey done by the abolitionist Death Penalty Information

continued

Center (DPIC) assigns "actual innocence" to any legal determination of "not guilty."[21] Lawyers and laypeople alike would immediately discern a distinction to which the DPIC does not admit. The ordinary meaning of actual innocence is that the defendant did not participate in the crime. An acquittal upon retrial means only that the defendant is found "not guilty" under the legal standard of "beyond a reasonable doubt." An appellate court may have ordered the exclusion of key evidence upon retrial. The passage of time - sometimes as much as 20 years between trial and retrial - is one among many factors that may shape the outcome on retrial.

Kentucky's own Larry Osborne case is illustrative. The sole eyewitness to the burglary, double murder, and arson was drowned prior to trial, so his sworn grand jury testimony was used.[22] The appellate court declared this a hearsay violation, and reversed and remanded for a new trial.[23] The prosecution's inability to introduce this critical eyewitness account of the crimes resulted in an acquittal upon retrial. Osborne was found "not guilty" under the legal standard of "beyond a reasonable doubt." He was not found "innocent." It is therefore not accurate to say, on this basis, that Osborne was an "innocent" man removed from death row.

Michael St. Clair's case is another example of how misleading the numbers game can become. Colorado opted not to prosecute him for the carjacking of the 26-year-old paramedic. New Mexico opted not to prosecute St. Clair for the capital murder of that carjacking victim. This was hardly a determination of innocence as some would suggest; it was simply awareness on the part of Colorado and New Mexico that St. Clair had been extradited to Kentucky upon recapture, to face the death penalty here.

Such surveys also view executive pardons, and prosecutorial decisions to abandon pursuit of cases after reversal and remand, as determinations of innocence.[24] The recent wholesale, indiscriminate clearing of Illinois' death row by a politically ruined governor does not mean that any of those more than 100 defendants are actually innocent. Likewise, a prosecutor's post-reversal decision to no longer pursue a case may be made for a number of legitimate reasons, none of them having anything to do with actual guilt or innocence of the defendant.

The survey by death penalty abolitionist Joseph Leibman has been roundly criticized for selectiveness in data gathering. The Nevada Attorney General's Office recently observed that the survey omitted eight executions there between 1977 and 2000.[25] Also,

> . . . it appears that Leibman picked and chose his cases, tailoring the study to get certain results. He took cases from 1973 - 1995 for some results; 1993 - 1995 for other results; and 1973 - April, 2000 for others. He used only published opinions for some results, but used unpublished opinions for others. He used only Nevada Supreme Court or federal appeal cases for some results, but added lower state court cases to increase reversals. Leibman didn't count all Nevada cases. He excluded killers who discontinued their appeals.[26]

Previous actions of the U.S. Supreme Court render the use of pre-1976 cases in such surveys statistically incorrect, and further skew the results. Leibman's survey suffers this flaw, and death penalty opponents in Kentucky appear to have added this ingredient to their survey recipe as well. In 1972, the U.S. Supreme Court effectively required commutation of all death sentences in the nation because of new procedural safeguards the Court was creating.[27] Kentucky was among many States quickly reenacting their death penalty statutes in what they thought was compliance with the new U.S. Supreme Court requirements. It was not until 1976 that the U.S. Supreme Court found any such reenacted statute satisfactory.[28] Consequently, the reversal or commutation rate of death sentences in 1973 was 100% regardless of the defendants' culpability. No one questions that the reversal or commutation rate has steadily dropped ever since.

Moreover, anti-death penalty surveys should, but apparently do not, take into account the overwhelming number of defendants who have been re-convicted after appellate reversal of their capital trials, or whose original convictions are left intact upon reversal of their sentences.

In Kentucky, death sentences in seven cases under the present statute have been upheld on federal habeas review. Four have been reversed. Of this total of 11, four are awaiting Sixth Circuit review. Of the three Sixth Circuit reversals of Kentucky death sentences so far, one defendant's guilt was affirmed and another was resentenced to death by a jury 20 years after his crimes. The other was effectively acquitted of murder by the federal appellate court on the basis of wording in a jury instruction.[29] The opinion in that case admitted the evidence of guilt was "strong" and "overwhelming."[30] To characterize that former death row prisoner now as innocent would fail the straight-face test.

Surveys such as these are calculated to convince lawmakers and the public that innocent defendants have been wrongfully condemned and executed, approximately 100 they now say - the count keeps changing. The authors of such a survey published in 1987, in response to a deconstruction of their work, stated in 1988 that, "We agree with our critics that we have not proved these executed defendants to be innocent; we never claimed that we had."[31]

Barry Scheck, cofounder of the Innocence Project, has admitted on national television that he had no proof that an innocent defendant has been executed since 1976.[32]

Dr. Isaac Ehrlich has estimated that each execution of a murderer prevents an average of seven additional murders. More recently, Dr. Stephen Layson put the number even higher. These findings and numerous others are cited in a *Journal of Socio-Economics* article by Dr. Samuel Cameron.[33]

Another study found that prisoners, by a five-to-one ratio, believed the prospect of the death penalty was a deterrent sufficient to dissuade them and others from murdering their victims.[34]

The death penalty does not take innocent lives. It saves innocent lives, and it does so exponentially.

Capital Sentencing in Kentucky is Race Neutral

Some years ago, in response to repeated claims that the death penalty is racially discriminatory, the Attorney General's Office examined records concerning the racial composition of Kentucky death row inmates and their victims. It was a daunting task because many of the prosecutors who had tried the cases had long since left office, and trial transcripts in most of the cases contained no mention of the racial characteristics of either the defendant or the victim. To the extent there was any such mention by a litigant, it was brought up by the defense.

Dr. Isaac Ehrlich has estimated that each execution of a murderer prevents an average of seven additional murders. More recently, Dr. Stephen Layson put the number even higher.

Recent capital cases in which the victims were black have caused death penalty opponents to muffle, if not abandon, their argument about the racial composition of the victims. The racial composition of the 35 inmates presently on Kentucky's death row is 74% White (26 of 35), 23% Black (8 of 35), and 3% Hispanic (1 of 35). Both of the men executed since 1962, Harold McQueen in 1997 and Edward Harper in 1999, were white.

Maturity Varies Among Individuals

Some Murderers Who Were Under Age 18 When They Killed Their Victims Deserve the Death Penalty

Opponents of the juvenile death penalty argue that persons under age 18 have incomplete brains and are prohibited from drinking alcohol, smoking cigarettes, purchasing firearms, and enlisting in the armed forces. Those very kinds of arguments have been rejected by the U.S. Supreme Court.[35] Death penalty opponents successfully argued in the 1972 *Furman* case[36] that individualized consideration of the defendant, his character, his record, and the circumstances of his crime must be the touchstone in all capital prosecutions.[37] It is more than just untenable for those same abolitionists to depart from their longstanding position of advocating case-by-case scrutiny, and to instead urge that the assignment of death penalty eligibility or ineligibility should be made according to temporary membership in a class defined only by birth date; it is situational double thinking of classic dimension.

Practical necessity has caused state legislatures to impose strict, bright-line age limits for drinking, smoking, *et cetera,* en mass. Society has not the time, resources, inclination, or duty to judicially determine whether every 14-year-old who considers himself mature enough to drive should receive an operator's license, or whether certain 15-year-olds are sophisticated enough to drink alcohol.

Fortunately, the number of juveniles over 16 who commit murder is far less than the number who engage in other typically adult behavior. Society owes itself the duty to examine each juvenile charged with murder and to determine individually, as is done with all other alleged murderers, the sophistication of the particular defendant. It is safe to assume that a defendant who commits murder a week after his 18th birthday would have had the same level of maturity and accountability for a murder he committed two weeks earlier.

Kevin Stanford was only months shy of his 18th birthday when he executed a 20-year-old gas station attendant who was the single mother of an 11-month infant girl.[38] Stanford robbed and sodomized his victim, both anally and orally.[39] After perpetrating these horrific acts, Stanford drove his victim to a remote area, allowed her to smoke a last cigarette, then executed her with two gunshots to the head. Stanford punctuated his crimes by leaving the victim's corpse naked from the waist down, kneeling in the back seat of her mother's car, with her buttocks elevated in a "mooning" position. Stanford later laughed and boasted to others, including authorities, about what he had done to the victim. Once incarcerated, he sneaked up behind a jail guard, put the end of a pencil against his ear, and said, "Click, click, click, just like the girl, I'm going to blow your [expletive] brains out."[40] In a separate instance, another guard overheard Stanford laughing and boasting, again prior to trial, about his decision to execute his victim:

> (H)e said he made her suck his [expletive] and then he came about saying, "we [expletive] her in the 'booty'. . . ." * * * "I had to shoot her, the bitch lived next door to me and she would recognize me." * * * "I guess we could have tied her up or something or beat the piss out of her and tell her, if she tells, we would kill her." At that time, Mr. Stanford began laughing . . . .[41]

On prior occasions, Stanford had been sent to five different juvenile correctional facilities.[42] In a unanimous decision affirming Stanford's death sentence, the Kentucky Supreme Court (Justice Charles Leibson not sitting because he was the trial judge who imposed the sentence) noted that, "Since the age of ten, Stanford has . . . committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few."[43]

The U.S. Supreme Court affirmed the sentence of Stanford's jointly tried codefendant after granting certiorari on two separate questions.[44] Two years later, the U.S. Supreme Court affirmed Stanford's sentence after granting certiorari on the question whether the juvenile death penalty is constitutionally permissible.[45] Both Stanford and his jointly tried codefendant have exhausted all the appeals to which they are entitled. Considering the intense scrutiny paid to Stanford's trial during the past 22 years, and the sheer number of published state and federal court opinions his case has generated, it is impossible to imagine a more reliable determination of guilt and punishment.

While on death row, Stanford forcibly raped another inmate. Though Stanford was not criminally prosecuted for that particular assault,

his appeal from an administrative determination of guilt[46] resulted in a published opinion.[47] Stanford's death sentence for the execution-style murder he committed on January 7, 1981 has not been carried out; he has not been permanently incapacitated.

The Allocation of Public Funds for Death Penalty Litigation is Slanted in Favor of Murderers and Their Lawyers

Amid the perennial sound and fury about public defender underfunding in capital cases is the familiar budget comparison chart. Predictably, the budgets for police, jails, prisons, courts, and County Attorneys are lumped together with those for Commonwealth's Attorneys and the entire Office of Attorney General (OAG). This ignores the fact that only Commonwealth's Attorneys and only one division of the OAG prosecute capital cases, handling privately defended and publicly defended cases alike. The OAG also represents the public in utility rate litigation, consumer fraud, public corruption, uninsured employer claims, telemarketing no-call lists, identity theft, victims' rights, and a broad variety of civil cases to which the Commonwealth is a party.

Among the various sources augmenting DPA's state budget, which now include the billing of clients to the extent they can pay, is a recent federal statute through which all federal habeas litigation on behalf of Kentucky's death row inmates is paid in full.[48] The hourly attorney rate prescribed by the federal statute is $125, approximately three or four times the hourly state wage of the Assistant Attorney General on the other side of the case. Also, the public is not aware, because the media have not reported it, that the state salary of Kentucky's public defenders has recently become substantially higher than that of their prosecutorial counterparts.

All Kentucky death penalty cases on federal habeas review are handled by DPA staff or by contract lawyers approved by DPA. That has been true both before and after the $125 per hour statute was enacted for the specific purpose of providing counsel to indigent death row inmates who were "truly unrepresented."[49] It might surprise some in Congress to learn that vast sums of federal money earmarked for the "truly unrepresented" are being used instead to supplement the budgets of state public defender agencies already representing those prisoners anyway. When the first document filed in these federal habeas cases is a standard motion by DPA lawyers requesting their own "appointment" under the federal statute, and payment for work already done, any characterization of their clients as *pro se* or "truly unrepresented" would be shameless fiction.

A public defender recently suggested to a federal judge that all of the funding billed by salaried attorneys under the federal statute is turned over to DPA, the agency.[50] Illustrative of the amounts involved is the federal habeas case of death row inmate Thomas Bowling. For the District Court litigation alone, DPA salaried lawyers billed for a court approved total of more than an eighth of a million dollars in federal money: $131,548.10 to be exact.[51] Under the federal habeas statute, 28 U.S.C. 2254, claims of constitutional error are supposed to be confined to those already litigated in the state courts, so most of the work is already done before the case reaches the federal habeas level.

If Congress genuinely intends this kind of supplement for those who represent capital murderers, perhaps it should consider leveling the playing field by allocating matching funds for those who strive to uphold the state court judgments in those cases. The state legislature should shore up the salaries for prosecutors so that they earn at least as much as public defenders. We should keep in mind that the Constitution does not even require the appointment of counsel beyond direct appeal; neither does it require that the death penalty process be stacked against the innocent public. ■

David A. Smith is an Assistant Attorney General and the supervisor of the Capital Litigation Branch of the OAG's Criminal Appellate Division, handling capital cases at trial, on appeal, post-conviction, federal habeas and certiorari. He has been with the Attorney General's Office since 1981. Mr. Smith has been an instructor at the Kentucky State Police Academy and an adjunct professor of constitutional law at Kentucky State University since 1994. The views expressed in this article are those of the author and do not necessarily reflect the views of the Attorney General's Office, the Kentucky State Police, or Kentucky State University.

Endnotes

1. *Commonwealth v. St. Clair*, Bullitt

continued

Co. trial tr., app. pend. *St. Clair v. Commonwealth*, Ky. Sup. Ct. No. 99-SC-29.

2. *Commonwealth v. St. Clair*, Hardin Co. trial vt., app. pend. *St. Clair v. Commonwealth*, Ky. Sup. Ct. No. 01-SC-209.
3. Notes 1 and 2, *ante*.
4. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871, 872-873 (1993) and *Commonwealth v. Thompson*, Lyon Co. No. 86-CR-33 tr. of retrial, app. pend. *Thompson v. Commonwealth*, Ky. Sup. Ct. No. 01-SC-869.
5. *Commonwealth v. Johnson*, Floyd Co. trial tr., affirmed, *Johnson v. Commonwealth*, Ky., 103 S.W.3d 687 (2003).
6. *Commonwealth v. Skaggs*, Barren Co. tr. vt.of retrial, app. pend. *Skaggs v. Commonwealth*, Ky. Sup. Ct. No. 2002-SC-436.
7. Jefferson Co. trial tr., affirmed, *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987).
8. *State v. Blanton*, Tenn., 975 S.W.2d 169 (1998) and *State v. Hall*, Tenn., 976 S.W.2d 121 (1998).
9. *Id.*
10. *Harper v. Parker*, USDC /WD-Louisville tr. of hrg., No. 99-5686, affirmed, *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999).
11. *Fryrear v. Parker*, Ky., 920 S.W.2d 519 (1996).
12. Until 1975, "life without parole" was a sentencing option for rape.
13. DPA br. for appellants, pp. 15-16, No. 94-SC-539-DG and unpub. op. of Lyon Circuit Court No. 93-CI-48 at pp. 19-20.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Fryrear, et al. v. Parker*, Lyon Circuit Court No. 93-CI-48, unpub. op. at p. 20.
18. *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519 (1984).
19. *Harper v. Commonwealth*, Ky., 694 S.W.2d 665 (1985).
20. Leibman, Fagan & West, *A Broken System: Part I, Error Rates in Capital Cases and What Can Be Done About Them* (July 12, 2002).
21. *The Death Penalty-Innocence Issues*, Dudley Sharp, Director, Justice for All, July 2002, essay at http://w1.155.telia.com.
22. *Osborne v. Commonwealth*, Ky., 43 S.W.3d 234, 239 (2001).
23. *Id.*
24. *The Death Penalty-Innocence Issues, supra*.
25. *The Writ*, Washoe County Bar Association, Vol. 22, No. 11, November 2000.
26. *Id.*
27. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
28. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
29. *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).
30. *Id.* at 281.
31. Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 Stanford Law Review 161, 264 (1988), in response to Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stanford Law Review 121 (1988).
32. Matt Lauer interview, NBC's *The Today Show*, November 13, 1998.
33. Vol. 23, No. ½, p. 197 at p. 202 (1994).
34. Cited in *People v. Love*, 56 Cal.2d 720; *also see* Sebha & Nathan, *British Journal of Criminology*, 24: 221-249 (1984).
35. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).
36. *Furman v. Georgia, supra*.
37. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).
38. *Stanford v. Commonwealth*, Ky., 734 S.W.2d 781 (1987).
39. *Commonwealth v. Stanford*, Jefferson Co. No. 81-CR-1218, trial tr., affirmed, *Stanford v. Commonwealth, supra,* and *Buchanan v. Commonwealth*, Ky., 691 S.W.2d 210 (1985).
40. *Commonwealth v. Stanford*, Jefferson Co. trial tr., No. 81-CR-1218, trial tr. and *Stanford v. Commonwealth, supra,* 734 S.W.2d at 787, n. 6.
41. *Id. Also see Stanford v. Commonwealth*, 734 S.W.2d at 788.
42. *Commonwealth v. Stanford*, Jefferson Co. No. 81-CR-1218, trial tr.
43. *Stanford v. Commonwealth*, 734 S.W.2d at 792.
44. *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).
45. *Stanford v. Kentucky, supra*.
46. Based upon a standard of "some evidence."
47. *Stanford v. Parker*, Ky. App., 949 S.W.2d 616 (1996).
48. Title 21, U.S.C., Sec. 848 (q).
49. *In re Parker*, 49 F.3d 204, 210 (6th Cir. 1995); *Steffen v. Tate*, 39 F.3d 622, 624 (6th Cir. 1994).
50. *Matthews v. Parker*, USDC / WD-KY No. 3:99 CV-P91-H, Rec. Doc. Entry No. 106, n. 4.
51. *Bowling v. Parker*, USDC / ED-KY No. 5:99-cv-00236-KSF, Rec. Doc. Sheet, pp. 3-16.